

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1191

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

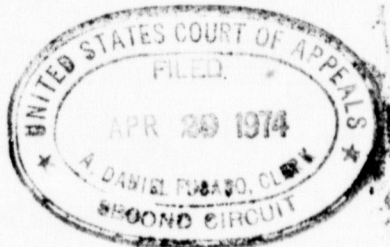
JOHN BROWN,

Appellant.

Docket No. 74-1191

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the District Court improperly failed to
suppress the sawed-off shotgun seized pursuant to a search
warrant issued without probable cause.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable John F. Dooling) entered on February 8, 1974, after a non-jury trial, convicting appellant of possession of an unregistered firearm, in violation of 26 U.S.C. §5861(d). Appellant was sentenced, pursuant to 18 U.S.C. §3651, to a split term of five years, six months to be served in custody with the execution of the remaining four and one-half years suspended and appellant to be placed on probation.

Although appellant appeared pro se at trial, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged* with possession of an unregistered J.C. Higgins sawed-off 12 gauge shotgun, in violation of 26 U.S.C. §5861(d) and 26 U.S.C. §5841, which require that such a weapon be registered.

*The indictment is annexed as B to appellant's separate appendix.

The shotgun was discovered at an apartment being used by appellant at 560 Osborn Avenue in Brooklyn, pursuant to a search made by members of the New York City Police Department acting under the authority of a search warrant.*

A. The Motion to Controvert

Pursuant to defense counsel's** motion to controvert the grounds for issuance of the search warrant, a hearing was conducted to determine whether the supporting affidavit of Patrolman Cannon contained the requisite probable cause. The affidavit in support of the search warrant contains the following allegations:

I am a police officer assigned to narcotics district #12 O.C.C.B.

I have information based upon information and investigation of Organized Crime Control Bureau Complaint #3-884. Investigation and personnel observation of the above mentioned Patrolman reveals the following: On Feb. 1, 1973 during the hours of 2245 to 2335 observed two males enter 560 Osborn Ave and go to the ground floor rear apt.

*The search warrant was issued by The Honorable Nicholas Coffinas, Criminal Court Judge of the City of New York, on February 6, 1973. The warrant, supporting affidavit, and inventory are annexed to appellant's separate appendix as C.

**Appellant did not elect to proceed pro se until the trial on October 18; therefore, at the hearing on the motion to controvert, held on April 13 before The Honorable Orrin G. Judd, appellant was represented by assigned counsel, Ms. Marion Seltzer of The Legal Aid Society, Federal Defender Services Unit.

remain there for a period of (3) three minutes and then exit. Then one female enter remain (3) minutes and then exit. At 2327 hrs. one male entered and is a known drug addict. On Feb 2, 1973 during the hours of 1535 to 1600 I observed (5) five males enter and exit all at different time Also one female did enter and proceed to the rear apt. knock and enter (2) two minutes later she exited. This female is an addict from Feb. 1, 1973.

On Feb. 1, 1973 one male was arrested at 2335 Hrs. and stated after being advised of his rights that one, JD "ONE EYE JOHN" did sell him a quantity of heroin and did show him one 38 Cal. revolver and one sawedoff shotgun. Through the officers investigation it was learned that JD ONE EYE JOHN is in fact one known to this department under B# 824576 one John Brown and is wanted under warrent #12715, Supreme Court Docket #7257/72

Observation of said premises indicates that drug users and sellers are frequenting asis premises. I have been a police officer the past seven years, I have given testimony wiht respect to narcotic cases and I am of the opinion that said premise if being used to process narcotics. It is requested that this warrent be endorsed in accordance with "NO KNOCK" provisions, because of the easily disposable nature of the contraband.

the deponent further states that through his investigation one known as John Brown has possession and control of aforementioned apt. and that the drugs were sold and possed in said apt. He further states that the 38 Cal. revolver was in his possession while in the apt.

(Errors in the original).

At the suppression hearing the Government introduced the search warrant and Cannon's supporting affidavit sworn to before the issuing magistrate (H.13*). In addition, Cannon testified at the hearing that he informed Judge Coffinas orally at the time of the application for the search warrant that the bench warrant mentioned in his affidavit was issued on a narcotics possession charge dating back to October 1970 (H.10-12). The Government failed to establish whether this statement was made under oath.

With regard to the arrest of the police informant, Cannon testified at the suppression hearing that the informant was the male addict referred to in the supporting affidavit and seen entering and leaving appellant's apartment on February 1. Cannon further testified at the suppression hearing that when this informant was arrested he possessed three \$5 bags and a "tin foil packet" of heroin, and that prior to this occasion he had never supplied the police with information (H.28-33).**

The Court thereafter found that the issuing magistrate had sufficient "information"*** for issuance of the warrant (H. 41).

*Numerals in parentheses preceded by "H" refer to the transcript of the hearing conducted on August 30, 1972.

**This supplemental information was given in an oral unsworn statement and was not contained in the sworn affidavit requesting issuance of the search warrant.

***It is unclear from Judge Judd's terse statement whether he was referring solely to the sworn affidavit of Cannon or to the affidavit as amplified by the additional information given to the magistrate and that testified to at the suppression hearing.

B. The Trial*

William Cannon, a New York City police officer then assigned to narcotics work,** testified that he had had the premises located at 560 Osborn Avenue, Brooklyn, under surveillance on the evening of February 1, 1973,*** at which time he observed an unknown person who later proved to be Jerry Johnson enter and later leave appellant's apartment (43****). He stated that shortly thereafter he and other members of his team arrested Johnson in possession of a quantity of drugs.

According to the testimony of Jerry Johnson, an unemployed truck driver and police informant, after his arrest on February 1, the police promised to "get [him] off" if he "cooperated." Johnson agreed, accepted the "deal" (36), and thereafter involved appellant in drug dealing. Based on information obtained from Johnson following his arrest, Cannon asked

*At the District Court's direction assigned counsel, Ms. Marion Seltzer of The Legal Aid Society, Federal Defender Services Unit, sat at counsel table throughout the course of the trial. Appellant elected to waive a jury trial, and with the Government's consent was tried non-jury before Judge Dooling.

**Officer Cannon was later reassigned to the 105th Precinct in Queens.

***Cannon stated that this apartment was under surveillance on two prior occasions when he observed appellant enter and leave the rear apartment with the use of a key (Trial transcript at 48).

****Numerical references in parentheses are to pages of the trial transcript.

✓ for and obtained a search warrant directed at the apartment at 560 Osborn Avenue, Brooklyn, used by appellant.

On February 8, 1973, the police entered the apartment and arrested appellant on an outstanding bench warrant (49).* A search of the apartment pursuant to the search warrant uncovered an unloaded sawed-off shotgun (Government Exhibit #2) (74) in the bedroom under a bed (55).**

Later that night during interrogation at the precinct appellant stated that the apartment belonged to his girlfriend who was away at the time,*** and that the shotgun belonged to a "friend" for whom he was "holding" it (61).****

Gunnar Erickson, a Special Agent with the Alcohol, Firearms, and Tobacco Division of the United States Treasury Department, identified Government Exhibit #2 as a shotgun with

*Also present were five other unidentified persons whom the police arrested and charged with loitering for the purpose of using drugs.

**Cannon stated that after the discovery of the shotgun but before taking appellant to the precinct it was necessary to get his street clothes, which were found in the same bedroom as the shotgun (59).

***Appellant further stated that he was paying the rent until his girlfriend returned (61).

****Jerry Johnson, the informer, testified that when he visited appellant at 560 Osborn Avenue on the evening of February 1, 1973, he observed a sawed-off shotgun in the living room (26); that he inquired of appellant whose gun it was; and that appellant stated "it was his" and that he had been robbed "but it was not going to happen again" (27).

an eight and a half inch barrel.*

Joseph Duggan, a Special Agent of the Alcohol, Tax, and Firearms Bureau, testified that examination of the records of the central registry of the National Firearms Regulation and Transfer Records, maintained in Washington, D.C., revealed that the weapon (Government Exhibit #2) was not registered** to appellant (96).

Thereafter the Government rested its case. The defense called no witnesses.

The Court found appellant guilty as charged.***

*Although he did not test-fire the weapon, based on a "functional" test performed in court, Erickson concluded that it was operable (94-95). An alleged ballistics expert, Frank Giugliano of the New York City Police Department, later testified that he had test-fired the gun and found it operable (146-49).

**The certified results of this search by the Treasury Department were introduced into evidence as Government Exhibit #4.

***Judge Dooling's written findings are annexed as D to appellant's separate appendix.

ARGUMENT

THE DISTRICT COURT IMPROPERLY FAILED
TO SUPPRESS THE SAWED-OFF SHOTGUN
SEIZED PURSUANT TO A SEARCH WARRANT
ISSUED WITHOUT PROBABLE CAUSE.

Upon entry into appellant's apartment on February 8, 1973, the police immediately placed appellant under arrest pursuant to the outstanding bench warrant. This arrest occurred in the living room. Thereafter, acting pursuant to the search warrant herein, the police conducted a search of the entire apartment and discovered the sawed-off shotgun in the bedroom hidden beneath the bed.

The search warrant here was issued by Judge Coffinas, a judge of the Criminal Court of the City of New York. Accordingly, this Court must apply the Criminal Procedure Law of the State of New York in determining whether the warrant was validly issued. See Miller v. United States, 357 U.S. 301 (1958); United States v. DiRe, 332 U.S. 581 (1948); Traub v. Connecticut, 374 U.S. 493 (1963). Pursuant to C.P.L. §690.35(1), the issuing judge may rely only on information contained in the affidavit in support of the application for the search warrant unless the affidavit is supplemented by a sworn and recorded statement at the time the search warrant is issued. C.P.L. §690.40(1).

In Aguilar v. Texas, 378 U.S. 108 (1964), the Court held that where an informant's tip is relied upon to establish probable cause for the issuance of a search warrant the support-

ing affidavit must establish within its four corners two prerequisites:

- (1) The underlying circumstances from which the informant concluded that illegal activities were occurring (often referred to as the basis of knowledge), and
- (2) Underlying circumstances supporting the belief that the informant is reliable (often referred to as the basis for reliability).*

As stated by the Court in Spinelli v. United States, 393 U.S. 410, 417 (1969):

If the magistrate decides that the tip cannot be credited in either of these two ways, the magistrate must then look to other parts of the affidavit to determine if the information compiled by independent police investigation sufficiently establishes probable cause.

Since the Cannon affidavit** makes no showing of the prior reliability of the informer, it fails to meet the second prong of the test set forth in Aguilar. Therefore, the issue here is whether, absent such proof, the police investigation

*This requirement is satisfied when the supporting affidavit sets forth the informant's record of past reliable performances, e.g., that he has provided information on specified prior occasions which has led to the seizure of illegal materials or arrests resulting in conviction. See, e.g., United States v. Fantuzzi, 463 F.2d 683, 687-88 (2d Cir. 1972); United States v. Dunning, 425 F.2d 836 (2d Cir. 1969).

**The affidavit is set forth as C to appellant's separate appendix.

was sufficient independently to corroborate the informant's tip. Cannon's affidavit states that eight unidentified persons, two of whom were "known drug addicts," were seen entering and leaving appellant's apartment. Based on Cannon's testimony at the suppression hearing, the District Judge below read into the affidavit that the informant was one of the "male[s]" seen entering the apartment the evening of February 1. From the face of the warrant, however, this is pure speculation.

Moreover, even if the affidavit is so interpreted, the fact remains that the police did not search the informant before entering the apartment, and therefore had no way of corroborating what, if anything, the informant obtained inside the apartment. Further, even an observation of the informant entering and leaving the apartment is "innocent-seeming activity" (Spinelli v. United States, supra), and is not enough to corroborate information from a source of unknown reliability.

The supporting affidavit makes no assertion that the informant purchased drugs from appellant at his apartment. Although this was later established at the suppression hearing and at trial, since it does not fall within the four corners of the affidavit it was not, and could not be, considered by the issuing magistrate. C.P.L. §690.35(1); §690.40(1).

Cannon's statement in the affidavit that a bench warrant was then outstanding did not provide information which would cure the defects because there was no indication in the affidavit that the warrant was for a drug- or firearm-related

charge, and furthermore because it could have been issued anywhere in the State of New York. Although Cannon orally advised Judge Coffinas that it related to a narcotics possession charge dating back to October 1970, this information was in an unsworn statement and was unrecorded, and may not be considered under C.P.L. §690.40(1) in determining probable cause. Moreover, assuming the existence and validity of the bench warrant -- which was never proved at the hearing or the trial -- while providing probable cause to arrest, it did not corroborate the informant's tip in any way.

The supporting affidavit is composed solely of conclusory allegations. These include "known drug addict;"* "through investigation it was learned that JD One-Eye John is in fact ... John Brown;" "I am of the opinion that said premise if [sic] being used to process narcotics;" "investigation [reveals] one known as John Brown has possession and control of [the] ... apartment [under surveillance];" and "that the drugs were sold and possessed [sic] in said apartment." These conclusions are not premised in any facts set forth in the affidavit, and the source of such information and the grounds for their belief are not revealed, as is also required. C.P.L. §690.35(2)(c).

Since police observation of unknown persons entering

*Cannon's supporting affidavit is internally inconsistent in that the "female" allegedly observed entering the apartment on February 1, while not claimed to be an addict on that date, was claimed to be an addict when she returned to the premises on February 2.

and leaving an apartment is no proof of criminal activity therein (see People v. Dumper, 28 N.Y.2d 296 (1971)), the police investigation here falls in the same inconclusive category as the FBI investigation in Spinelli v. United States, supra.*

Comparison of Cannon's affidavit with the one considered in United States v. Harris,** 403 U.S. 573 (1971), leads to the same conclusion. There, unlike the present case, the

*In Spinelli, the supporting affidavit contained the following allegations:

(1) That the FBI had observed Spinelli's movements on five days during August 1965 and on four of those days he was observed crossing a bridge from Illinois into St. Louis, Missouri, where he parked his car in a lot used by residents of an apartment in St. Louis. On one day he was seen entering an apartment in that building.

(2) That an FBI check with the telephone company disclosed that the apartment the accused had entered had two listed phones under the name of another person.

(3) That Spinelli was "known" to FBI agents as "a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

(4) That the FBI was informed by a "confidential reliable informant" that Spinelli was operating a wagering operation by means of the two listed phone numbers.

However, unlike Spinelli, appellant was not "known" to be a narcotics dealer, or even a drug user. Moreover, unlike Spinelli, the police herein acknowledge the informant's lack of reliability.

**The affidavit in Harris alleged:

(1) The accused had been known as a trafficker in whiskey;

accused was "known" over the past four years as a dealer in untaxed whiskey. In addition, a federal agent on a prior occasion had in fact seized whiskey from the defendant's house. Moreover, the informant there was known to be "prudent," and made a sworn statement against penal interest admitting that he had bought whiskey from the accused at his house within the past two weeks.

The Government realistically did not contend below that Johnson's information constituted a statement against penal interest on the rationale adopted by a plurality of the Court in Harris. Since Johnson was arrested in possession of drugs and agreed to cooperate with the police in order to avoid incarceration, his statement, far from being against penal interest was a self-serving declaration designed and intended solely to extricate him from the consequences of his crime. His statement was therefore highly suspect, especially since the transaction involved narcotics. Jaben v. United States, 381 U.S. 214 (1971).

Unlike Harris, here there were no prior undercover buys nor prior seizures. Moreover, unlike the case here, in-

(2) Another officer had seized whiskey on the premises before;

(3) An unnamed person fearing for his life revealed in a sworn statement that he had purchased whiskey from the accused within the past two weeks;

(4) The affiant found this person to be prudent.

Id., at 575-76.

dependent investigation in Harris corroborated that the accused was engaged in criminal activity.* Whitely v. Warden, 401 U.S. 560 (1971); Spinelli v. United States, supra; United States v. Cancesco, 470 F.2d 1224, 1231 (2d Cir. 1972).

In Whiteley, supra, the Supreme Court held that

... the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in Draper itself, were in the process of committing the felony.

401 U.S. at 567.

Since the independent police investigation did not sufficiently corroborate the informant's tip, the search warrant should not have issued and it was error to refuse to suppress the shotgun.

*Similarly, in United States v. Viggiano, 433 F.2d 716 (2d Cir. 1970), which also involved an informant of unproved reliability, independent investigation corroborated that a truck hijacking had occurred involving clothes of the same type and labels as the informant had described. See also United States v. Dzialak, 441 F.2d 212 (2d Cir. 1971).

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the indictment dismissed.

Respectfully submitted,

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Certificate of Service

April 29, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

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